Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-6370.

ALBERT ABLE and BETTY ABLE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

MOTION TO DISMISS OR AFFIRM.

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IN THE

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No. 79-6370.

ALBERT ABLE and BETTY ABLE,
Appellants,

v.

THE STATE OF DELAWARE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION TO DISMISS OR AFFIRM.

The Appellee respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware on the ground that it is manifest that the question on which the decision of the cause depends is so insubstantial as not to require further argument.

STATEMENT OF THE CASE.

Appellants Albert Able and Betty Able are the biological parents of the four children, known here as Candy, Dorothy, Elizabeth and Fred, who are the focus of this appeal. Appellee Division of Social Services of the Delaware Department of Health and Social Services ("the Division") is statutorily required to seek out minors in need of protection and care within the State. 31 *Del. C.* ch. 3.

Betty Able was born on April 5, 1953. Albert was born four years earlier.[1] Candy was born on April 24, 1969, when her mother was just sixteen years old. Dorothy was born on April 21, 1971.[2] Appellants voluntarily surrendered custody of Candy and Dorothy to Division in April, 1972. Albert was unemployed and the two parents were unable to cope with parenting.[3] Betty suggested that Candy and Dorothy be placed in Division foster care for six months to a year.[4] Betty testified that the placement was made to allow Betty and Albert to "work out problems."[5] Candy and Dorothy were returned to Betty and Albert in June, 1972.[6]

Subsequent to the return of Candy and Dorothy, Elizabeth was born on January 24, 1973. During this

1. 1 Tr. 113. The trial in this matter occurred over a period of three days. Each day's proceedings is recorded in a separate transcript. References in Appellee's Motion to Dismiss or Affirm to the August 22, 1977, hearing shall be denoted "1 Tr.", references to the August 23, 1977, hearing shall be denoted "2 Tr.", and references to the April 25, 1978, continued hearing shall be denoted "3 Tr.".

2. Appellant's Answer Brief in Delaware Supreme Court Below at ii.

3. 1 Tr. 190.

4. 1 Tr. 191.

5. *Id.*

6. 1 Tr. 101.

period, as during prior and subsequent stages, it was the goal of Division to keep the Able family together [7] and to provide supportive social services.[8] A representative of Division maintained almost daily contact with Betty and Albert.[9]

During the Summer of 1973, Division briefly held legal custody of Candy, Dorothy and Elizabeth.[10] This custodial relationship was apparently the result of Betty's hospitalization among other factors.

Between August, 1973 and March, 1974, the Division's direct observations and communications from the parents and the children caused it serious concern. Candy expressed a desire to leave the Able home and return to a foster mother.[11] Betty apparently did not object.[12] Candy, then age four, was sleep-walking and strewing food at random around the Able home.[13] Dorothy exhibited a fear of male figures.[14] The Able house was unkempt.[15] Betty and Albert fought verbally and physically.[16] Albert on one occasion forced himself sexually on Betty.[17] Albert exhibited a sporadic employment pattern.[18]

In early 1974, Betty informed the Division that she was again unable to cope with the three children. She

7. 1 Tr. 8, 21.
8. 1 Tr. 13.
9. 1 Tr. 9.
10. 1 Tr. 101-103.
11. 1 Tr. 22.
12. *Id.*
13. 1 Tr. 11, 24.
14. 1 Tr. 11.
15. 1 Tr. 13.
16. 1 Tr. 15.
17. 1 Tr. 16.
18. 1 Tr. 17-18.

requested that they be placed in foster care immediately.[19] Betty and Albert executed consent papers to such placement soon thereafter.[20] Betty stated that an extensive period would be needed in which to resolve domestic problems. The Division was asked to keep the children in foster care for at least a year *even if* she requested their return in a shorter period.[21] The children were subsequently placed in foster care in March, 1974.

Subsequent to March, 1974, the Division's goal in the Able matter remained the reunification of the family.[22] This in spite of the fact that Betty and Albert had become separated.[23] The Division's plan was to observe enough progress in the Able home that the three children could begin to return in the Summer of 1975.[24]

During the Winter of 1974-1975, Albert experienced several changes in employment.[25] Fred was born on January 4, 1975. In April, 1975, the electricity to the Able home was shut off due to nonpayment of bills.[26] The Division interceded with the local power company and electric service was resumed.[27]

After a brief period of stability in the husband-wife relationship, arguments began again. Betty attempted to evict Albert from the home as a result of the arguments and Albert's drinking.[28] Over the objections of the Divi-

19. 1 Tr. 26.
20. 1 Tr. 27.
21. *Id.*
22. 1 Tr. 51.
23. *Id.*
24. 1 Tr. 66, 67.
25. *Id.*
26. 1 Tr. 68.
27. 1 Tr. 69.
28. 1 Tr. 72, 73.

sion, Candy's custody was returned to the Ables in September, 1975.[29] The Division's opposition stemmed from the continued fighting, Albert's unemployment, and Betty's allegations to the Division that Albert was involved with another woman.[30]

The Division's concerns were well-founded. Candy's sleep-walking and food-throwing episodes were again manifested.[31] Betty continued her heavy dependence on Division employees for advice in basic parenting skills.[32]

In November, 1975, Dorothy and Elizabeth were returned to the Ables pursuant to court order.[33] The burden of having to care for their four children simultaneously proved overwhelming to Betty and Albert. Within one week of the return of Dorothy and Elizabeth, Betty informed the Division that the Able home was deteriorating.[34] Betty experienced severe depression.[35] Candy and Elizabeth continued to sleep-walk and destroy food.[36] All three girls, then ages 6, 4, and 2 respectively, exhibited bed-wetting behavior.[37] Albert recommended Elizabeth's removal from the home.[38] Candy missed 46 days of school during the 1975-76 school year.[39] The electricity to the Able home was again turned off.[40] Betty

29. 1 Tr. 76.
30. *Id.*
31. 1 Tr. 79.
32. 1 Tr. 78.
33. 1 Tr. 80.
34. 1 Tr. 81.
35. *Id.*
36. 1 Tr. 82.
37. 1 Tr. 88, 89.
38. 1 Tr. 83.
39. 1 Tr. 169.
40. *Id.*

overdosed on drugs and was hospitalized in March or April, 1976.[41]

During this tumultuous period, Division representatives strongly urged the Ables to seek assistance from Delaware Guidance for Children and Youth, Headstart Day Care and a Public Health Department milk program.[42] Other services which were urged on the Ables included Public Health Service nurses and the services of a State Mental Hygiene clinic.[43]

In May, 1976, the Family Court awarded permanent custody of all four Able children to Division.[44] Concurrently, the Division made the decision that the termination of the Ables' parental rights in the children would lie in the best interests of the children. Among other things, the termination decision was based on the lack of improvement in the family situation over a five year period, the poor husband-wife relationship, Albert's lack of steady employment, and the deterioration in the home which was triggered every time the children were returned.[45] It was also felt that neither parent was capable of functioning as a "full parent" and the children were suffering as a result.[46] The future of the children became paramount in the collective eyes of the Division.[47]

Immediately after the four Able children were placed in foster care, improvement in their growth was observed. Fred was unable to chew food and walk at 16 months.[48]

41. 1 Tr. 92.
42. 1 Tr. 84, 85.
43. 1 Tr. 122.
44. 1 Tr. 93.
45. 1 Tr. 94, 95.
46. 1 Tr. 119.
47. 1 Tr. 120, 138.
48. 1 Tr. 165.

Shortly after his placement, he was walking and eating with a fork and spoon.[49] Candy's bed-wetting, which occurred during visits and placements in the Able home in the past, had subsided by November, 1976. She verbalized desires not to return to the Able home.[50]

From March, 1976 until the time of the hearing on the Division's termination petition, Betty and Albert Able were seen weekly by Dr. V. Terrell Davis, Director of Psychiatry at the Wilmington (Del.) Medical Center.[51] Davis testified at the initial termination hearing in August, 1977, that his first contact with Betty resulted from her hospitalization for drug overdose in March, 1976.[52] Davis testified that Betty's psychological problems were in part due to her inability to care for her children.[53] He stated that the removal of the children from the Ables helped the Ables and their children at the same time.[54]

Davis conceded that during his treatment of the Ables, they showed "extremely poor judgment" in dealing with personal problems.[55] Despite the fact that he never saw the Ables interact with their children,[56] he further testified that perhaps the Ables could one day manage parental responsibilities.[57]

At the continued hearing on the Division's petition in April, 1978, Dr. Davis testified that Albert and Betty's dependency continued.[58] He guessed that perhaps in two to five years the Ables may be ready to care for the Able

49. 1 Tr. 167.
50. 1 Tr. 176.
51. 2 Tr. 5-7.
52. 2 Tr. 6.
53. 2 Tr. 10.
54. 2 Tr. 8.
55. 2 Tr. 11.
56. 2 Tr. 13.
57. 2 Tr. 15.
58. 2 Tr. 116.

children.[59] Nor did Betty Able have an idea as to how long it would take to resolve persistent problems.[60] He conceded, however, that regression was a possibility[61] and that instability in the home persisted even in the absence of the children.[62]

Dr. Priscilla A. Keeler, a private practitioner in child psychiatry, was called by the Division to testify at the April, 1978, hearing. She saw the Able children together and separately in November, 1977, and in April, 1978.[63] She also saw the Ables together in April, 1978.[64] She testified that the multitude of moves of the Able children was "extraordinarily damaging."[65] She testified that each of the Able children is vulnerable to stress and strain[66] and that each will bear the scars of his childhood experiences forever.[67]

Dr. Keeler articulated specific injuries which the Ables' chronic neglect had caused. Candy's enforced isolation from the surrounding community slowed her development.[68] Through their own dependency, the Ables forced Candy to assume parental roles at the age of seven years.[69] Keeler testified that in all her years of practicing child psychiatry, she had never seen a child as terrified as Dorothy.[70] She exhibited enuresis of likely emotional

59. 3 Tr. 119.
60. 3 Tr. 184.
61. 3 Tr. 129.
62. 3 Tr. 152.
63. 3 Tr. 10.
64. 3 Tr. 40.
65. 3 Tr. 12.
66. 3 Tr. 18.
67. 3 Tr. 67.
68. 3 Tr. 17.
69. 3 Tr. 25.
70. 3 Tr. 19.

origin.[71] Elizabeth manifested isolation.[72] Fred initially showed below-level performance in almost all levels of functioning[73] as a "failure to thrive" child.[74] She attributed his slowness to emotional and physical neglect.[75]

Dr. Keeler articulated Betty's continuing "tremendously strong dependency needs."[76] She flatly stated that she did not think they could ever be made to be adequate parents.[77] She concluded that the Able children have been deprived of their right to a normal, loving, nourishing home life which will facilitate their development into secure and happy adults.[78] The deprivation has resulted in permanent psychological scarring.[79]

Based on the testimony above, the Superior Court held that Albert and Betty Able were not capable of acting in the role of parents to their four children.[80] The children were found to have been "so damaged" by Betty's and Albert's dependency needs that there is a "present and urgent need for a normal caring and loving home life so that they can develop into normal children and then adults." The Court specifically rejected the specter of indefinitely long-term foster care.[81]

On behalf of Candy, Dorothy, Elizabeth and Fred, appellee respectfully requests that this Court give finality to the judgment below and thereby permit the permanent adoptive placement of these children who have suffered so much from the neglect of the Ables.

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71. 3 Tr. 32.
72. 3 Tr. 36.
73. 3 Tr. 20.
74. 3 Tr. 21.
75. 3 Tr. 37, 38.
76. 3 Tr. 41, 43, 74, 76.
77. 3 Tr. 73.
78. 3 Tr. 49.
79. 3 Tr. 67.
80. Appellants' Jurisdictional Statement, Appendix C.
81. *Id.*

THE QUESTION IS INSUBSTANTIAL.

The Delaware TPR Statute Is Not Unconstitutionally Vague and Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[82] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois,* 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interest of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of the Able children clearly satisfies the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to

82. Appellants cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflects the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. Compare *Quilloin v. Walcott,* 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); *Prince v. Massachusetts,* 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); *Cleveland Board of Education v. LaFleur,* 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); *Moore v. East Cleveland,* 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); *Wisconsin v. Yoder,* 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); *Meyer v. Nebraska,* 262 U. S. 390 (1923) (state law prohibits teachings in German language).

> force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before Smith.[83]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498 (1972).

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83. Parental unfitness has been statutory ground for protecting children since 1907. *In re Three Minor Children*, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. *Cline v. Hartzler*, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g. Smith v. Smith*, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); *In re Fusco*, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); *In re Two Minor Children*, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); *In re E.*, 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). *In re One Minor Child*, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supercedes "desires of parents").

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. ". . . [A]s to matters pertaining to custody of children, [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee,* 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clark v. Lyon,* 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children,* 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court has held that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children,* 407 A. 2d 198, 200 (Del. 1979).

Indeed, the Second Circuit has recognized in *Duchesne v. Sugarman,* 566 F. 2d 817 (2d Cir. 1977), cited by Appellants, that termination proceedings are "fact specific" in nature. The Appellants miss the mark when they attack the Delaware courts for arbitrariness because they require each case to be decided on its own facts. What the Delaware courts have done is to ensure that the principles enunciated by the Delaware Supreme Court are fully considered on the specific facts of each case brought before them.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has sug-

gested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children, supra* at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. See 13 *Del. C.* § 772(a). The application of those factors here confirms the result of the trial court.

The Appellants miscite this Court's holding in *Smith v. Goguen,* 415 U. S. 605 (1974) in claiming that it stands for the proposition that state regulation of the parent-child relationship must satisfy "a greater degree of specificity than in other contexts." *Smith v. Goguen, supra* at 573, J. S. 8. *Smith* is a flag desecration case, not a TPR or custody case. The quotation in Appellants' Jurisdictional Statement refers to an attempt to regulate speech protect by the First Amendment.

The conflict which appellants would create in the decisions of the courts which have considered TPR statutes under attack for vagueness does not commend itself to this Court's attention. *Alsager v. District Court,* 406 F. Supp. 10 (S. D. Iowa 1975) *aff'd. on other ground,* 545 F. 2d 1137 (8th Cir. 1976) is a judicial aberration.[84] Misapplying a strict vagueness test analogous to that employed in analyzing criminal statutes or those which chill protected First Amendment speech, the *Alsager* court overlooked or ignored the significance of the child's right to be free from an empty if not damaging "family" situation.

84. Only *Roe v. Conn,* 417 F. Supp. 769 (M. D. Ala. 1976) and *Davis v. Smith,* — Ark. —, 583 S. W. 2d 37 (1979) purport to follow Alsager.

For the state, or a legal guardian,[85] institutes a TPR proceeding not for its own benefit but for that of the child. To require a strict vagueness analysis is to condemn children who are neither abandoned nor seriously physically abused to suffer from an ideal called family integrity when the very dynamics of that concept do not lend themselves to precise definition.

Alsager stands appropriately alone in its analysis. The vast majority of state courts have refused to follow its teachings.

In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 O. S. 1971, § 1130 A.(3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn. . . .*" *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex. 1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic standards which the "average intelligent person can understand" [86] or which can be "commonly grasped." [87] Some state courts which rejected vagueness challenges prior to Alsager were not swayed by the same rationale.[88]

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85. 13 *Del. C.* § 1104.

86. *Matter of D. T.,* 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); *In re William L.,* 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

87. *In re Metteer,* 203 Neb. 515, 279 N. W. 2d 374 (1979).

88. *E.g., In re Cager,* 251 Md. 473, 248 A. 2d 384 (1968); *State v. McMaster,* 259 Ore. 291, 486 P. 2d 567 (1971).

The Court should dismiss this appeal because of the clear lack of a substantial constitutional question. The almost universal refusal to follow *Alsager* is recognition that

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster*, 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

CONCLUSION.

Appellee respectfully requests the Court to dismiss or affirm the appeal or in the alternative to consolidate this case for argument with *Doe and Roe v. The State of Delaware*, No. 79-5932.

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